MALAYSIAN REPORTS

Muniandy & Anor v Muhammad Abdul Kader & Ors

SUPREME COURT (KUALA LUMPUR) – CIVIL APPEAL NO 226 OF 1987
ABDUL HAMID LP, MOHAMED AZMI AND HARUN SCJJ
11 APRIL AND 26 MAY 1989

Land Law – Claim for vacant possession of land – House built on land – Whether occupiers protected by Control of Rent Act 1966 – Whether ground rents paid by occupier – Equitable estoppel – New point raised on appeal not allowed to be argued

Civil Procedure – Appeal – Question of fact – New point raised on appeal not pleaded or argued in courts below – Equitable estoppel – Importance of pleadings

In this case the respondents had obtained an order for vacant possession of land against the appellants. There was an unnumbered plank house erected on the land by the second appellant's late husband. The issues before the learned magistrate who heard the case was whether the house was built before or after 31 January 1948 and whether the appellants had paid ground rents to the respondents or any of their predecessors in title. The learned magistrate found that the house was subject to the rent control legislation as it was built before 31 January 1948 but she found no evidence that any ground rent had been paid either to the respondents or to any of their predecessors. She therefore entered judgment for the respondents. An appeal to the High Court was dismissed and the appellants appealed to the Supreme Court. At the hearing of the appeal before the Supreme Court, counsel for the appellants conceded that the findings of fact made by both the courts below must be accepted. He applied to introduce and argue a fresh point not pleaded or argued in the courts below that as owners of the plank house, the appellants had an equitable interest in the land and as such were not trespassers, but have a tenancy coupled with an equity.

Held, dismissing the appeal:

(1) The protection claimed by the appellants under the rent control legislation by reason of the fact they were ground tenants was clearly untenable in law. As there was no dispute on the ownership of the house, the issue was not at all relevant and ought to have been immediately rejected by the learned magistrate and the learned judge.

(2) The onus was on the appellants to prove that they had paid the ground rents and the learned magistrate was justified in holding that the appellants had not discharged this burden.

(3) The authorities do not support the appellants' application to allow the new point to be raised and argued on the appeal even though the point was not pleaded or raised in arguments in the courts below. The present case does not come under any of the established exceptions. The new point to be raised is not one of jurisdiction or illegality. It is also not a mere omission which could be categorized as falling within the realm of technicality. The so-called omission is in fact a new line of defence altogether.

(4) This was not an appropriate case where the court should allow the appellants to argue a new line of defence without hearing fresh evidence. Without adducing fresh evidence it is not possible for instance to conclude under what circumstances the second appellant's husband and she herself were required or allowed by the then predecessor in title to build the plank house and how much money had been expended in the construction of the plank house and whether any improvements had been made for the purpose of determining whether the payment of reasonable compensation would be sufficient to satisfy the equity.

(5) If the appellants' application were allowed, not only a whole range of entirely new issues would have to be determined but it would also be inconsistent with the appellant's defence under the rent control legislation. The application to argue the new defence of equitable estoppel was therefore refused.

Cases referred to

1 *Mok Deng Chee* v *Yap See Hoi & Ors* [1981] 2 MLJ 321 (refd)
2 *Antonio Dias Caldeira* v *Frederick Gray* (1936) 5 MLJ 137 (refd)
3 *Khew Ah Bah* v *Hong Ah Mye* [1971] 2 MLJ 86 (refd)
4 *Inwards* v *Baker* [1965] 1 All ER 446 (refd)
5 *Ramsden* v *Dyson* [1866] LR 1 HL 129 (refd)
6 *Yong Mok Hin* v *United Malay States Sugar Industries* [1967] 2 MLJ 9 (refd)
7 *Attorney-General* v *Pang Ah Yew* [1934] MLJ 184 (refd)
8 *Banbury* v *Bank of Montreal* [1918] AC 626 (refd)
9 *Letchumi & Anor* v *Asia Insurance Co Ltd* [1972] 2 MLJ 105 (refd)
10 *See Hua Daily News Bhd* v *Tan Thien Chin & Ors* [1986] 2 MLJ 107 (refd)
11 *S Mariappan* v *Government of Malaysia* [1983] 2 MLJ 340 (refd)
12 *Keng Soon Finance Bhd* v *MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457 (refd)
13 *Hadmor Productions* v *Hamilton* [1983] 1 AC 191 (refd)
14 *Burns* v *Devon's Iron Works Ltd* [1961] SC 102 (refd).

Legislation referred to
Control of Rent Act 1966

Appeal from: Civil Appeal No 74 of 1981 (High Court, Penang)

G Sri Ram for the appellants.
Abu Haniffa Md Abdullah for the respondents.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): This is an appeal against the decison of Edgar Joseph Jr J who upheld an order of vacant possession dated 4 November 1981 granted to the respondents by Puan Ho Mooi Ching, the magistrate of George Town, Penang. The order relates to vacant possession of that portion of holding no 18, town subdivision 9W, north east district, Penang, on which stood an unnumbered plank house erected by the second appellant's late husband by the name of Koniah, and now owned and occupied by her together with her son, the first appellant. The respondents' claim is based on a notice to quit issued on the first appellant requiring him to vacate the respondents' land within one month from 2 August 1974 and on another notice to quit issued on 3 April 1980 requiring the second appellant to quit the land forthwith for trespassing. Both the appellants refused to comply with the said notices. Hence the suit taken against them.

Before the learned magistrate, two main issues were canvassed by the appellants for the purpose of establishing that they were protected by the Rent Control Act 1966. The first issue was whether the house was built before or after 31 January 1948 and the second issue was whether the first appellant and his mother, the second appellant were paying ground rents to the respondents or to any of their predecessors in title. On the evidence before her, the learned magistrate concluded that the house was subject to rent control legislation as it was built before 31 January 1948 by the deceased Koniah who was the father of the first appellant and the husband of the second appellant. But on the second issue, she came to the conclusion that both the appellants were trespassers, there being no relationship of landlord and tenant. She found no evidence that any ground rent had been paid either to the respondents or to any of their predecessors in title. Hence she entered judgment for the respondents. On appeal to the High Court, the discussion on the first issue would appear to be an exercise in futility. The protection claimed by the appellants under the Rent Control Act by reason of the fact that they were ground tenants is clearly untenable in law. As there was no dispute on the ownership of the house, the issue was not at all relevant and ought to have been immediately rejected both by the learned magistrate and the learned judge. As stated by Salleh Abas FJ (as he then was) in *Mok Deng Chee* v *Yap See Hoi & Ors*[1] at p 323 on the application of the Rent Control Act 1966:

> The Act, inter alia, protects a tenant who rents a house from his landlord, where the house was built before 31 January 1948. It has nothing to do with the case of a tenant who rents only the land but owns the house, ie the Act does not apply where the landlord does not own the house.

Regarding the other issue, the appellants continued with their same argument as in the Magistrate's Court that the appellants did pay ground rents at one time or another to the predecessors in title, in particular NTS Arumugam Pillai, to whom, according to para 5 of the amended statement of defence, the second appellant had been paying monthly rent since 1963.

It is obvious on the pleadings and the evidence adduced at the trial that the main and only thrust of the appellants' defence was that they paid ground rents to Arumugam Pillai since 1963 until the respondents purchased the property in 1974. It was on this payment of land rents that consent of Arumugam Pillai must be assumed over appellant's occupation of the property since 1963. In dismissing the appeal the learned judge had no choice but to treat the appeal as based solely on the question of whether the appellants occupied the land as trespassers or as tenants paying ground rent to the respondent's predecessors in title or any of them. After examining the evidence relevant to this question, the learned judge upheld the findings of fact of the learned magistrate that no rent had ever been paid either to the respondents or to any of their predecessors in title, and that the appellants were trespassers. Sitting as an appellate court, the learned judge applied the test laid down by the Privy Council in *Antonio Dias Caldeira* v *Frederick Gray*,[2] and consequently saw no reason to dissent from the conclusion arrived at by the learned magistrate.

Having regard to the state of the pleadings we entirely agree with the ruling of both the courts below that the onus was on the appellants to prove the averment in their amended defence that since 1963 they had paid ground rents to Arumugam Pillai, one of the predecessors in title. These payments were within their particular knowledge, and as stated by the learned judge, 'It was not for the plaintiffs to prove a negative'. The first appellant had admitted in cross-examination that he had never paid any rent for the land although he tried to resile from his admission in re-examination. Neither did the appellants produce any rent receipts nor did they produce an alleged letter from Arumugam Pillai giving them permission to occupy the land. Arumugam Pillai was not even called to testify although he was available as a witness.

It is therefore not suprising that before us, counsel for the appellants has straightaway conceded that the findings of fact made by both the courts below must be accepted. But he intends to introduce and argue a fresh point not pleaded or argued in the courts below that as owners of the plank house, the appellants have an equitable interest in the land, and as such they are not trespassers, but have a tenancy coupled with equity in accordance with the principles laid down in *Khew Ah Bah* v *Hong Ah Mye*[3] and *Mok Deng Chee* v *Yap See Hoi & Ors*.[1] Both these authorities were based on the equitable principle laid down in *Inwards* v *Baker*[4] at p 448, which refined the concept of equitable estoppel in tenancy law. The principle is also known as tenancy coupled with equity and referred to in *Ramsden* v *Dyson*[5] by Lord Kingsdown as the principle of irrevocable licence. In our opinion, it is pertinent to observe that where the defence of equitable estoppel succeeds it does not necessarily follow that a claim for vacant possession must fail. The principle merely says that where a defendant acquires a tenancy coupled with equity, the landlord cannot recover vacant possession of his land by merely terminating the tenancy with notice to quit, but he must also satisfy the equity. In what way the equity would be satisfied must depend on the facts and circumstances of each case. In *Khew Ah Bah's* case,[3] the equity was held to be satisfied by the landlord paying a reasonable compensation to the defendant who was the owner of the house.

The learned counsel for the appellants has referred to us two authorities which would persuade us to allow a new point to be raised and argued in this appeal although the matter was not pleaded or raised in arguments in the courts below. We would deal first with the case of *Yong*

Mok Hin v *United Malay States Sugar Industries Ltd*[6] where MacIntyre J in delivering the judgment of the Federal Court quoted the observation of Reay J in *Attorney-General* v *Pang Ah Yew*[7] at p 197 and that of Finlay LC in *Banbury* v *Bank of Montreal*[8] at pp 654, 705 and 714, as based on the general principle that 'where a decision on a question of law is dependent upon a finding of fact which was not made by the judge or jury because the question was not raised or put at the trial or where the question of law cannot be resolved without further evidence not available on the record, a Court of Appeal would not interfere with the judgment or verdict of the lower court.' This principle is subject to certain exceptions as expounded by Lord Parker and Lord Wrenbury in the *Banbury* case.[8] According to the Federal Court:

> Two points emerge from observations of Lord Parker and Lord Wrenbury. They are, first, that a point of law could be taken up for the first time on appeal if it raised a question of jurisdiction; and, secondly, the Court of Appeal would entertain a point of law not raised in the court below if it would result in the rectification of an erroneous order.

The other case cited is *Letchumi & Anor* v *Asia Insurance Co Ltd*[9] where the Federal Court had allowed a new point to be raised in the interest of justice which was an omission at the trial. Ong CJ said:

> An omission, at the trial by inadvertence or otherwise, to canvass an arguable point is not the same thing as abandoning it altogether – which would have precluded us from re-opening and reconsidering the matter'.

We would also refer to a decision of this court in *See Hua Daily News Bhd* v *Tan Thien Chin & Ors*[10] at p 108 where following *S Mariappan* v *Government of Malaysia*[11] it was held that, 'This court has a discretion in the interest of justice to allow the objection on jurisdiction although it was never raised in the courts below'. This exception to the principle was fully discussed by Abdul Hamid, FJ (as he then was) in *Mariappan's* case.[11] More recently the Privy Council in *Keng Soon Finance Bhd* v *MK Retnam Holdings Sdn Bhd & Anors*[12] has stated as an exception to the rule that parties must be bound by their pleadings:

> It is well established as a general principle that the illegality of an agreement sued upon is a matter of which the court is obliged, once it is apprised of facts tending to support the suggestion, to take notice ex proprio motu and even though not pleaded (see eg *Edler* v *Auerbach* [1950] 1 KB 359) for clearly no court could knowlingly be party to the enforcement of an unlawful agreement.

Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions* v *Hamilton*[13] at p 233:

> Under our adversary system of procedure, for a judge to disregard the rule by which counsels are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is...

As to what is a technical ground in an objection to defective pleading can be illustrated from the judgment of Clerk Thomson LJ in *Burns* v *Devon's Iron Works Ltd*[14] at pp 107 to 108:

> The court is often charitable to records, and is slow to overturn verdicts on technical grounds. But when a pursuer fails completely to substantiate the only grounds of faults averred and seeks to justify his verdict on a ground which is not just a variation, modification or development of what is averred (ie pleaded), but is something which is new, separate and distinct, we are not in a realm of technicality'.

In our view these authorities do not appear to support the appellants' application. The present case does not come under any of the established exceptions. The new point to be raised is not one of jurisdiction or illegality. It is also not a mere omission which could be categorized as falling within the realm of technicality. The so-called 'omission' is in fact a new line of defence altogether. The new defence based on equitable estoppel was never pleaded or argued in the courts below. The stand taken by the appellant throughout was that they were not trespassers because they were paying ground rents to Arumugam Pillai since 1963, and due to the said ground tenancy, they claimed, albeit mistakenly, protection against eviction under the rent control legislation.

For the reasons stated we do not think this is an appropriate case where we should allow the appellants to argue a new line of defence without hearing fresh evidence. To establish a defence of tenancy coupled with equity it may be necessary to enquire further whether the second appellant had acquired the equity from her late husband Koniah through transmission or whether she had acquired it herself from Arumugam Pillay. Without adducing fresh evidence, it is not possible for instance to conclude under what circumstances Koniah or the second appellant was required or allowed by the then predecessor in title to build the plank house, and how much money he had expended in the construction of the plank house and whether any improvements had been made to the house, either by Koniah or the appellants over the years, for the purpose of determining whether the payment of reasonable compensation would be sufficient to satisfy the equity. On the other hand, the period of overstaying from the expiry date of notices to quit might be long enough to satisfy it. In other words, if the appellants' application were allowed, not only a whole range of entirely new issues would have to be determined, but it would also be inconsistent with the appellants' defence under the rent control legislation. The application to argue the new defence of equitable estoppel is therefore refused. For reasons already stated the appeal is dismissed with costs both here and in the courts

below. The deposit is to be paid to the respondents to account of taxed costs.

Appeal dismissed.

Solicitors: *Sri Ram, Zulkifly & Kumar; Syarikat Abu Haniffa*

Reported by *Prof Ahmad Ibrahim*

Kennesion Brothers Sdn Bhd v Construction Workers Union

SUPREME COURT (KUALA LUMPUR) – CIVIL APPEAL NO 555 OF 1987
ABDUL HAMID LP, MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
10 MARCH AND 5 MAY 1989

Labour Law – Recognition of trade union by employer – Whether recognition can be revoked or withdrawn – Industrial Relations Act 1967, ss 9, 12 & 18

In this case the respondent had on 25 June 1983 served on the appellant a claim for recognition to represent all workmen employed by the appellant except those employed in the managerial, executive, confidential or security capacity. The appellant apart from carrying on the business of civil engineering and building contracts is also in the quarry owner business. The appellant applied to the Director-General of Industrial Relations to ascertain whether all the workmen in respect of whom recognition was being sought could be classified as workers in the construction industry to enable the respondent union to represent them. The Director-General referred the matter to the Registrar of Trade Unions. Subsequently the Director-General informed the parties that the Registrar had decided that the respondent was not competent to represent the workmen employed in the business of the appellant. On 14 June 1985 the respondent served on the appellant a second claim for recognition but this time limited to workers employed at the appellant's quarry at Batu Caves. The appellant in reply accorded recognition to the respondent not only in respect of the quarry workers at Batu Caves but also those employed at its Hulu Langat quarries. Negotiations were begun to discuss a collective agreement but these proved unsuccessful. On 3 April 1987 the appellant unilaterally revoked the recognition accorded on 1 July 1985 before the Director-General could settle the trade dispute. The respondent then applied for a declaration that the purported unilateral revocation of the recognition was illegal, invalid and of no effect. The learned trial judge allowed the application on the ground that once a trade union had been accorded recognition by an employer that recognition could not be revoked. The appellant appealed.

Held, dismissing the appeal:

On the facts of the case, the appellant cannot, after according recognition to the respondent, revoke or withdraw such recognition unilaterally on account of an earlier decision of the Registrar of Trade Unions pertaining to a distinct and separate application for recognition.

Cases referred to

1 *Attorney General, Malaysia* v *Chemical Workers' Union of Malaya & Anor* [1971] 1 MLJ 38 (refd)
2 *Electrical Industry Workers Union* v *Registrar of Trade Unions & Anor* [1976] 1 MLJ 177 (refd)
3 *Metal Industry Employees Union* v *Registrar of Trade Unions & Ors* [1976] 1 MLJ 220 (refd)
4 *Tanjong Jaga Sdn Bhd* v *Minister of Labour and Manpower & Anor* [1987] 1 MLJ 124 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 9, 12, 18

Appeal from: Originating Summons No R8-31-91-87 (High Court, Kuala Lumpur)

CV Das (*S Nanthabalan* with him) for the appellant.
P Kuppusamy for the respondent.

Cur Adv Vult

Mohamed Azmi SCJ (delivering the judgment of the court): This appeal concerns a dispute over the revocation or withdrawal of recognition accorded by the appellant/employer to the respondent/trade union under s 9(3)(a) of the Industrial Relations Act 1967 to represent workmen employed at the Batu Caves and Hulu Langat worksites of the appellant's quarries. Sadly, this is yet another instance, where the court is required to determine an appeal without the benefit of a written judgment.

The brief facts of the case may be summarized as follows. On 25 June 1983 the respondent served on the appellant a claim for recognition in the prescribed Form A under s 9(2) of the Act to represent all workmen employed by the appellant except those excluded by s 9(1), ie workmen employed in the managerial, executive, confidential or security capacity (see document attached to exh CM3). Apart from carrying on the business of civil engineering and building contractors, it is common ground that the appellant is also in the quarry owner business. Rule 3 of the respondent's rules which governs the union's membership, provides that the union is open to workers who are employed in the construction industry which includes general and special-trade contracting establishments and construction services except workers excluded by s 9(1). Acting under s 9(3)(c), the appellant applied to the Director-General of Industrial Relations for ascertainment whether all the workmen in respect of whom recognition was being sought could be classified as workers in the construction industry to enable the respondent union to represent them. The Director-General exercised his discretionary power under s 9(4B)(b), and referred the matter to the Registrar of Trade Unions for a decision on the question of competency of the respondent to represent all the workmen employed by the appellant as contained in its application. By letter dated 23 January 1984 (see exh CM4) both the appellant and the respondent were informed by the